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ABSTRACT

This paper, the third in a series exploring future options for public policy in the communications and information arenas, argues that the communications spectrum--e.g., public mobile service, private radio, and domestic satellites--is a valuable but limited resource that should benefit all Americans. After a background discussion, it is recommended that a spectrum-charging scheme be implemented. It contends that: (1) such a scheme would create an economic incentive for efficient use of the spectrum; (2) less time and money would be wasted in awarding a license; and (3) the most important, the U.S. public would benefit from the inherent value of the spectrum, with the monies then used to promote public telecommunications, public interest programming, and minority ownership of broadcast facilities. The paper concludes by suggesting that charging for the spectrum is particularly appropriate now in light of the weakness of traditional broadcast public trustee regulation and the growing demands on the spectrum overall. (DB)

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3 Charging for Spectrum Use

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In early 1988, the Benton Foundation commissioned a series of eight papers to explore future options for public policy in the communications and information arenas. Written by recognized authorities in their respective fields, the papers identify critical issues and options confronting policymakers at the federal level.

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Charging for Spectrum Use

Henry Geller & Donna Lampert

About the Authors

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Executive Summary

Charging for use of the communications spectrum has numerous benefits over present methods of authorization. It would create an economic incentive for efficient use of the spectrum. Less time and money would be wasted in awarding a license. Most important, the American public would benefit from the inherent value of the spectrum, with the monies then used to achieve communications policy goals directly and effectively.

Free trade in the spectrum already exists in that once licenses are authorized, they are often sold at enormous profit. By charging for the use of the valuable spectrum at the outset, the public, instead of private parties, would reap the benefit.

After a background discussion noting various spectrum-charging proposals, the authors recommend that a spectrum-charging scheme be implemented. Specifically, the authors recommend that in the non-broadcast area, Congress specifically authorize the FCC to use auctions for all new authorizations. As to existing licenses (with an exception for public safety communications licenses), the FCC should develop a reasonable spectrum fee based upon "market value," fixed in a long-term contract.

In the broadcast area, the authors recommend an auction only for new, unassigned licenses since its use for present licensees would be overly disruptive and unfair, especially since there have already been "private auctions," with the value going to private parties. Existing broadcast licensees should be freed from substantially all "public fiduciary" regulation, allowing them to operate without content-based regulations such as the Fairness Doctrine. Licensees would instead be granted a long-term license (as opposed to the present 5-7 year renewal) for 30 or 40 years and would pay an annual spectrum fee of 1% of annual gross revenues for radio and 2% of annual gross revenues for television. The system would be implemented first for radio, and later for television.

All monies collected, whether from broadcast or non-broadcast use of the spectrum, would be deposited into a Public Telecommunications Trust Fund, which would directly achieve desirable public interest goals. Funds would be used to promote public telecommunications, public interest programming (which is lacking due to market failures), and minority ownership of broadcast facilities. The Fund would be independent with a structure that would avoid undue political entanglements.

Charging for the spectrum is particularly appropriate now in light of the weakness of traditional broadcast public trustee regulation and the growing demands on the spectrum overall. Because of the clear benefits of an auction/spectrum fee system, the burden should be on the government to explain why the public is not reaping the benefit from this valuable limited public resource.

I. INTRODUCTION: WHY CHARGE FOR THE RADIO SPECTRUM?

For over 60 years, communications regulation has been based on the notion that the radio communications spectrum is a public resource that should be awarded without charge to users in exchange for a promise of "public service." Now, however, there is an increased willingness to consider alternative regulatory approaches, particularly a system whereby users are charged for their use of the spectrum.

In part, the change results from the failure of the former method of regulation to achieve its stated goals; for example, in the broadcast field, where it sought to insure that each station serve as a community outlet and present substantial educational and informational programming. In part, the new interest is due to the increased recognition that the radio spectrum is a highly valuable and limited resource that can benefit all Americans if the primary users pay for its use, just as users of such natural resources as oil or federal grazing lands are required to pay. Not only is a pay-for-what-you-get system more "fair," it is the most economically efficient way to proceed. Finally, in these times of massive federal budget deficits, recouping some of the radio spectrum's value is highly attractive.

In examining matters relating to the spectrum, it is important to distinguish among the various aspects of spectrum management and regulation. First, there are questions relating to spectrum allocation—policy decisions regarding the uses to which various parts of the spectrum should be put, whether for cellular radio, broadcast stations, land mobile radio, etc. These are critical issues that have far-reaching consequences.[1] Therefore, the allocation function is the most important task of the Federal Communications Commission. Second, there are assignment issues, primarily concerned with matters of signal power, modulation, antenna height, etc. These are mostly of a technical, "traffic cop" nature. Finally, there are authorization issues—questions of *who* should be awarded a frequency in any given service. This paper is concerned with the

last of the three spectrum management functions, as it is the authorization system that is most clearly flawed at present.[2]

In making authorization decisions, there are several principles that have served as guideposts for appropriate public interest regulation and are central to the Communications Act of 1934. First, regulation should seek to encourage as much diversity as possible, especially through competition and open entry. Competition results in access to new technologies and innovations that benefit the American public generally. Diversification of the sources of information is a central tenet of the First Amendment, resting on the notion that the truth is more likely to emerge with diverse and antagonistic sources.[3] For example, Congress and the FCC have endorsed limits on the number of media outlets that may be owned by one entity, and have developed strong affirmative action programs designed to encourage employment and ownership by minorities and women.[4] Another principle embodied in the Communications Act is that the government, in a manner consistent with the First Amendment, should promote social goals that may not be met by the marketplace (e.g., educational and informational programming). This is especially critical in the mass media area. While these principles are not always easy to follow, they are the foundation of effective public interest regulation.

Charging for the communications spectrum has numerous benefits over alternative authorization processes. One purpose of such an approach is to capture for the American public some of the inherent value of the radio spectrum, and employ it to accomplish governmental goals more directly or effectively. This is especially true for broadcasting, where the goal of station operation attuned to local needs and interests (and of assuring basic fairness—i.e., devotion of a reasonable amount of time to covering conflicting views on issues of public concern) has not been achieved. Moreover, by charging for the spectrum rather than giving it away, there are great efficiencies to be achieved. Not only is less money and time wasted in awarding the license, but there is an additional incentive for the licensee to be efficient in its use of the frequency.

Free trade in the spectrum already exists. For example, over 65% of commercial television stations and 75% of commercial radio stations are not owned by the initial licensee.[5] The prices for such licenses can be staggering.[6] The flood of cellular radio applications and bidding "contests" that have occurred also illustrate the high value of the spectrum. The public, not private parties, should benefit from the spectrum's value.

This paper details various proposals that have been made to charge for spectrum use. As background, several legislative proposals in the public mobile service, private radio, and domestic satellite areas are noted. There is also a review of FCC decisions regarding auction use for domestic satellite and cellular applications. The paper then discusses the applicability of a spectrum use fee and auctions for broadcast licenses—an increasingly promising alternative in light of the weakness of traditional public trustee regulation. Finally, there is a brief discussion of the legal authority for such fees and auctions in these contexts, and the use of auctions by other branches of the Federal government. The authors conclude that the use of spectrum fees and auctions will confer significant benefits upon the public and greatly aid the FCC in its authorization decisions.

II. BACKGROUND: PAST PROPOSALS

A. Legislative Proposals

The idea of charging for the use of the radio communications spectrum has received considerable legislative attention. None of the legislative proposals has become law, largely due to heavy industry opposition and unreasonable fee structures. In 1979, bills were introduced in both the House and the Senate incorporating the idea of a spectrum or public resource fee. Senator Hollings introduced S.611 (96th Cong., 1st Sess.), which included a public resource use fee based upon the idea that "licenses...confer benefits to licensees above and beyond those accruing to the public at large" and that the United States should therefore receive fair payment for those

benefits based upon the fair market value of the benefit. Fees were to be collected annually by the FCC and transferred to the Treasury.

The bill gave the Commission significant leeway in establishing non-broadcast spectrum fees, stating that it should consider the amount and nature of frequency used, the time of day, the level of exclusivity of use, the geographic area of use, and any other factors it determined affected the fair market value of the license. As to fees for commercial broadcasters, they were subject to a complex formula ($7 multiplied by the difference between the number of TV households in the market and 60,000 households, divided by the product of the number of TV signals in the market multiplied by the number of VHF signals[7]).[8] Commercial broadcasters using UHF frequencies paid 25% of the VHF fee. Full-time radio broadcasters were expected to pay 20 times the station's highest one-minute spot announcement rate, while daytime-only radio broadcasters would owe 10 times the station's highest one minute spot rate. Because these fees were potentially enormous, there was a cap of 10% of the licensee's net annual income before Federal income taxes. Despite the payment of the fee, broadcasters were not relieved of any obligations to serve the public interest.

H.R. 3333, another general Communications Act amendments bill introduced in 1979, also contained a provision for a "spectrum resource fee." Like S. 611, the fees proposed were quite high and fairly complex. For television and radio broadcasters, the "scarcity value" was found to be 0.25% of the licensee's gross revenues for the past calendar year up to $1 million, 2.5% of gross revenues between $1 million and $10 million, and 10% of gross revenues exceeding $10 million.[9] In addition, broadcasters were to pay the cost of license processing. There was another lengthy formula applicable to land mobile services, which depended on market, number of licensees in the area, etc. All money was to go to the general fund of the Treasury, with no mention of any particular use.[10] Neither of these bills was enacted, despite some governmental support.[11]

In 1981, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, a House subcommittee staff report prepared under the leadership of then Chairman Timothy Wirth, proposed elimination of the public trustee concept for radio, with the substitution of a spectrum use fee.[12] While supported by one radio association (the National Radio Broadcasters Association), the proposal was opposed by the more powerful National Association of Broadcasters, which is dominated by the large TV interests. Thus, the proposal, which would have markedly served the interests of radio broadcasters, got nowhere.

In 1985, the FCC, under the direction of then Chairman Mark Fowler, made a proposal to Congress entitled the "Auction Licensing Act of 1985." The proposal was to apply to new services such as public mobile services (paging); Specialized Mobile Radio Systems (SMRS); exclusively assigned private radio service (e.g., radiotelephone, dispatch, paging); and domestic satellite services. Under this proposal, the FCC would have been given congressional authorization to use auctions when awarding initial licenses or construction permits in non-mass media services when there were or were likely to be mutually exclusive applicants. Receipts from the auctions would be deposited into the general fund of the U.S. Treasury. Under the proposal, the auction authority would expire after five years, presumably sufficient time to determine its success.

At that time, the FCC estimated that auction revenues for just the then-remaining land mobile assignments (excluding cellular) could be as high as $2 billion . Moreover, if other possible assignments were auctioned, especially satellite and other higher frequencies, the revenue potential would increase even further.[13] The proposal exempted public safety communications licensees (which include local government, police, fire, highway maintenance, and forestry conservation services[14]), as well as amateur radio and mass media services.

While the proposal provided that the sums collected would go into the general treasury, Chairman Fowler, in testifying on the desirability of auction authority, stated that auctions were clearly a

way to generate funds to help public broadcasting and for other purposes. In particular, he suggested programs that would aid small businesses that provide communications services requiring FCC licenses, and that would augment funding for research on new communications technology.[15] The legislative proposal never went anywhere.

Substantially similar legislation was proposed by the FCC in 1987, again authorizing (but not mandating) the Commission to use auctions if it determined that an auction would promote the best service in the shortest period of time and would additionally generate significant monies.[16] Under the proposed "Auction Licensing Act of 1987," the FCC would be permitted to select some non-mass media licensees (again excluding public safety and amateur radio) through a comparative hearing, lottery scheme, or an auction. This was not to have any effect on Commission *allocation* decisions, which would continue to be made based upon a public interest finding. As proposed in 1985, the auction would have been permissible only for unassigned spectrum, although it could have been used to assign licenses that had been revoked or otherwise made available for reassignment.[17]

Despite the fact that initial licensees would have to pay for the right to use their frequency, neither proposal would have altered the terms, conditions, or rights of the license. Thus, a licensee who gained a license by auction would not have been exempted from any condition or right of a licensee who had obtained a license through a comparative hearing or lottery.[18] Additionally, the auction authority would have been sunset after five years, to give Congress the ability to assess the Commission's experience, particularly as it might relate to expanded auction authority (presumably in the broadcast context).

The 1987 proposal, unlike the more generalized proposals that preceded it, did specify some of the methods by which the bid winner would be selected. Under the proposal, the auction would be conducted first, and only after an applicant were selected would its qualifications and petitions to deny be considered. In the event a

hearing were necessary at this post-auction stage, it would ordinarily be a "paper hearing." These measures would further the goal of an efficient and expeditious process, and are consistent with current FCC practice under its lottery authority. In contrast to the way the FCC administers lotteries, the auction mechanism would not use any preference system. Since this proposal applied only to non-mass media licenses, the diversification of ownership interest was deemed insignificant. Finally, consistent with the current general pay-for-what-you-get attitude, all bidders would be required to submit fees with their bids to cover administrative costs.

Only one additional legislative proposal was made[19], by Rep. Charles E. Schumer of New York, although it was never formally introduced. Under the proposal, the auction of non-broadcast portions of the spectrum was linked to increased funding for public broadcasting. A Public Broadcasting Fund would be established and credited with half the receipts garnered from an annual non-mass media auction for unassigned frequencies (including two-way common carrier paging; common carrier cellular radio; and private multiple address radio). The details were never worked out and the bill was never introduced.

Despite the strong support of the FCC (and other governmental agencies including NTIA, the FTC, and the Department of Justice) for some of these proposals and the fact that they were specifically tailored so as not to be disruptive, they never made any progress. Much opposition came from the land mobile industry and broadcasters, the latter fearing that the auction method might eventually be applied to broadcast frequencies. The sentiment towards these types of spectrum charge plans could change, however, if linked to desired changes in the "public trustee" scheme.[20]

B. The FCC and Spectrum Charges

Former FCC Chairman Mark Fowler and current Chairman Dennis Patrick have been leading advocates of the use of spectrum auctions. For the reasons outlined above, auctions are consistent with their general "marketplace" philosophy. Nevertheless, several

years ago, the FCC missed an opportunity to utilize auctions in the Multipoint Distribution Service (MDS), cellular, and domestic satellite areas—an opportunity that could have paved the way for the successful use of auctions today.

In 1980, NTIA urged the FCC to employ auctions in making authorizations in the MDS service. It argued that the Commission had the legal authority to so proceed, and that it was important to establish this precedent.[21] The FCC did not act on this petition.

In 1984 and 1985, the FCC was faced with the decision as to what method it should use to select among mutually exclusive applicants for a new domestic fixed-satellite service and for the developing cellular radio service. The Commission had concluded that in the cellular context, holding comparative hearings to decide among the applicants would be inappropriate due to the plan of "flexible use" that would permit the marketplace to develop spectrum uses in accordance with developing needs and technologies.[22] The alternatives were the use of lotteries as permitted by Congress or the use of auctions.

Several commenters in the public proceedings noted that auctions would have many benefits, and were particularly suited to achieving the Commission's stated policy objectives. Since the Commission stated in the cellular context that it wanted the spectrum to go to its highest valued use and to obtain "...valuable information on where the strongest demand for spectrum really is,"[23] the auction seemed to be a perfect fit. In an auction, the user who finds the spectrum the most valuable will pay the most.[24] The lottery, on the other hand, would not fulfill this goal—it involves pure chance and thus does not ensure that the license will go to the party who values it the most. In fact, what likely happens is that the license, once obtained, is then sold at some later time to the party that really values it.[25] In effect, then, there is a private auction, with the monies going to private parties rather than the government!

Unfortunately, despite the clear advantages of auctions, a 1982 congressional report opposed the use of auctions for the land mobile spectrum, stating its concern that "...selling frequency space to the highest bidder...will work to the detriment of an efficient and competitive private land mobile spectrum."[26] In its decision in the cellular proceeding, the Commission stated that unlike the use of the lottery, its authority to use auctions is not clear. Therefore, it opted for the lottery.[27] In effect, the FCC precluded itself from using auctions for cellular services without additional legislative authority. Since no such authority was ever forthcoming because of strong political opposition, the Commission has determined to use the lottery to choose licensees.[28]

In the domestic satellite field, the issue of FCC authority to use auctions was untouched by any legislative reference. The auction promised great benefits, especially with regard to attaining the highest valued use and in promoting new service in the fastest, most efficient way possible. Here, too, the FCC was urged by some public commenters to use auctions to award the domestic satellite frequencies.[29] A convincing legal argument existed that the FCC did indeed have the authority to use auctions in this field.[30]

Under the Communications Act, the Commission is empowered to "perform any and all acts, make such rules and regulations, and issue such orders..." as necessary to execute its functions.[31] It is also instructed to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[32] This authority has been construed to be the broadest possible grant, with great flexibility to adjust to the "dynamic aspects of radio transmission."[33] Because the advantages of using auctions are so great, it can be cogently argued that the FCC can utilize this flexible authority to assign frequencies among applicants. Moreover, unlike the land mobile area, there was no congressional report language to the contrary. Therefore, it could well be argued that Congress left the Commission with the flexibility to use auctions in the domestic satellite field if it deemed it in the public interest.

While it might be urged that legal authority such as *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), requires that a comparative hearing be conducted when the FCC awards mutually exclusive licenses, subsequent cases have made clear that as long as the Commission finds that a process serves the public interest as well or better than a full hearing, it has discretion to so proceed.[34] In the auction situation, each applicant does receive simultaneous "consideration" as required by *Ashbacker*. Further, the agency could reasonably find that the comparative hearing serves no useful purpose (especially in the common carrier or private radio fields) and that the auction is better suited to promoting the public interest. Most importantly, no license is awarded without a finding that the applicant is qualified and that the grant would serve the public interest.

Unfortunately, the FCC did not choose to employ auctions in the domestic satellite area either, primarily due to uncertainty about the extent of its authority. Given these cases, which were virtually tailor-made for the use of an auction, it seems clear that the FCC will not attempt to utilize auctions without clear and direct authority from Congress.

The Commission should be given that authority for all new authorizations, along the lines of its 1987 proposal. For existing licenses (again with the same exceptions[35]), the Commission should develop a reasonable spectrum use fee fixed in a long-term contract. The sums thus obtained should be used for the purposes set out by Chairman Fowler—i.e., funding public broadcasting, research on new communications technology, aid to small communications businesses, etc.

In 1978, the Commission issued a Notice of Inquiry concerning charges for use of the spectrum.[36] Not only did the FCC consider fees based upon the costs of operating the FCC sections that regulate particular users,[37] there was also a lengthy discussion of true spectrum fees that would be based upon the value of the spectrum used. In that regard, the Commission noted that "the radio frequency spectrum is a scarce and valuable natural resource;" that "in the

absence of any price being attached to the use of the spectrum, users have little or no reason to use it efficiently or to consider what others must give up when they use a particular portion of the spectrum;" and that "there might be great economic benefits to society if users did have to pay for the use of the resource."[38] The suggestion was made that auctions (for future applications) or spectrum fees based upon "fair market value" be utilized for both broadcast and non-broadcast uses that would "charge a price for spectrum use which accurately reflected the value of the spectrum to the user."[39]

In the Notice, the FCC set forth several possible formulas for the level of the spectrum fee. For example, one such formula related the fee to the amount of spectrum used; another related the fee to the information carrying capacity of the channels available to a particular licensee; and still another related the fee to the bandwidth, population in the area covered, and the part of the day the signal was transmitted.[40] In many ways, a formula such as the last is the most rational since it recognizes that a VHF station in New York City is worth more than the same bandwidth in Butte, Montana, due to the greater population and hence value in New York. Such a refinement would bring the fee slightly more in line with fair market value. What was also recognized by the FCC was that adjustments might be needed based on experience in order to have the fees more closely reflect a true market value.

Unfortunately, this proposal was never adopted and other than application fees, there is still no mechanism for capturing the spectrum's value for the American public.

III. BROADCASTING: SPECTRUM FEES & AUCTIONS

The current model of broadcast regulation has presented two basic problems. First and foremost, the public trustee model of regulation has not proven effective in meeting many of its public interest goals. Since the present structure of broadcast licensing rests upon the notion that licensees must affirmatively serve the public interest in return for their free and exclusive use of the limited

broadcast spectrum, there has been a need to evaluate the performance of broadcast licensees. But there are serious difficulties in conducting these evaluations. For instance, since the inception of the current licensing scheme, there has been an understanding that broadcasters should offer non-entertainment programming (now termed "community issue-oriented") as part of their public trustee obligations, especially local and informational programming. But the FCC has never specified or offered percentage guidelines as to what constitutes a "reasonable" or "substantial" amount of such programming, sufficient to insure license renewal.

Since 1981 in radio and 1984 in television, the Commission requires only a postcard at the time of license renewal, which asks five questions regarding the name of licensee and station location, whether EEO obligations have been met, whether there is alien ownership contrary to the Act, whether there are adjudicated character findings, and whether the licensee has placed relevant materials as required in its station files. Thus, the FCC now renews station licenses without collecting any data as to their public service efforts. Instead of requesting the relevant information from the licensees, the FCC relies upon the public to bring to its attention stations making inadequate efforts in community issue-oriented programming. The Commission has been indifferent to the obligation of commercial broadcasters to provide a reasonable amount of children's television programming of an educational and informational, age-specific nature. The list of regulatory failures in this respect could be lengthened. Suffice it to say that while the objectives of the public trustee licensing scheme are praiseworthy, the implementation of these goals in over 50 years of the Communications Act has been largely unsuccessful.[41]

Furthermore, the current public trustee system of broadcast regulation creates First Amendment strains, since it requires Commission consideration of broadcast content. While such content-based regulation in broadcasting has been found constitutional, it nonetheless continues to raise great controversies under the First Amendment. In recent years, there have been all-out constitutional attacks upon the basic premises of the public trustee model, such as

the fairness doctrine and the equal opportunities provision (Section 315). Thus, while the foremost argument for regulatory change is the ineffectualness of the present scheme of broadcast regulation, the elimination of the First Amendment controversy also argues for a new approach.

What is needed is a basic change in the structure of broadcast regulation. One such change would be to eliminate the underlying public trustee scheme of broadcasting, and replace it with a system where broadcasters are required to pay for the spectrum they use. Under the current system, broadcasters "volunteer" to be public trustees and are given free use of the spectrum in exchange for that pledge. While broadcast licensees explicitly do not *own* their segment of the spectrum, they are licensed to use it to the exclusion of all others as long as they act as fiduciaries for those excluded. With the failure of the public trustee regulatory scheme, a new deal is required if the government is to give licensees the exclusive use of these scarce and valuable frequencies.

While spectrum auctions are preferable in terms of economic and regulatory efficiency, such an approach is not feasible for existing broadcast licenses. First, there have already been "private auctions," where current licensees have paid for the value of the spectrum when they purchased the station. For example, $450 million was recently paid for channel 5 in Boston and $510 million was paid for a VHF channel in Los Angeles—sums far in excess of the physical assets and reflecting largely the scarcity value of the license itself. Given this fact, there clearly could not be any further auctions for those channels for a substantial period of time.[42]

In addition, there would be serious political problems in implementing a system of auctions for existing licensees. Current licensees, including the networks, would have to participate in the auction just to retain their licenses. The force of their lobbying pressure under these circumstances would be enormous and would make legislative passage of the auction proposal impossible.

More politically practical, therefore, is the institution of an annual spectrum use fee that would be charged for existing commercial broadcasting licensees. The fee might be set at 1% (for radio) to 2% (for television) of the licensee's annual gross revenues payable annually.[43] The fee system would be implemented first for broadcast radio stations, and then, if shown to be successful, would be followed in several years with a corresponding charge for television stations.[44] In return, "public fiduciary" obligations would be largely eliminated.

Such an approach certainly fits the current radio environment. The radio industry has become increasingly competitive and abundant. There are presently over 10,000 radio stations operating in the United States, with most major markets having more than 20-25 stations. For example, there are 63 in the Chicago area, and 41 in Washington, D.C. Stations in these cities are all seeking a programming niche for themselves, with music, talk, and other formats.

It strains credulity to regard these commercial radio licensees, struggling to survive in this fiercely competitive arena, as public trustees. Radio has changed greatly from the days when it ruled the airwaves. Commercial radio does not (with the exception of some all-news stations) present in-depth informational programming, such as coverage of important congressional hearings or debates, or serious drama or cultural programs, or special programming for the blind, or, with some rare exceptions, programming for children. It is public, noncommercial radio that strives to meet these important public service goals, and it is starved for needed funds. In short, public trustee regulation of commercial radio accomplishes very little; there are market deficiencies; and public radio, while motivated to meet these, lacks sufficient resources. The purpose of the revision proposed here is to create a structure that will directly and effectively serve the public interest, and without most of the First Amendment strains inherent in the current regulatory system.

Radio broadcasters would thus be substantially relieved of the vast majority of content-based regulation, including the core public trustee obligation—the duty to present community issue-oriented programming and controversial issues of public importance, including reasonable opportunity for contrasting viewpoints on such issues. Radio broadcasters would be virtually free to broadcast what they like, when they like. Even equal opportunities for political candidates (Section 315) would be significantly scaled back, with such requirements applicable only to paid time.[45] In short, FCC regulations and provisions of the Act that are content-based and flow from the public trustee rationale would be eliminated, with only structural regulations such as minority or cross-ownership, and "consumer protection"-type provisions remaining.[46]

In addition, radio licensees would be granted a long-term license for a period of 30-40 years, with the annual spectrum fee set for the entire duration of the contract. Thus, radio broadcast licensees would no longer be public trustees but would be bound by a different sort of "contract"—in exchange for continued operation on their frequencies, they would be subject to a spectrum use fee.

Once the fee is successfully implemented in radio, with some fine tuning by Congress as may be needed, the same scheme could be adopted for television broadcast licensees. Commercial television is also changing in light of new competitive pressures—from the rise of independents (many fed by satellite), cable television, VCRs, etc. As the television of abundance becomes reality, it will be sound policy in five years or so to re-examine and change the public trustee scheme in television, especially in light of its ineffectiveness.

Licensees would no longer be subject to suspension or revocation for violations of the Communications Act or FCC regulations, but would instead be subject to FCC imposed fines and forfeitures as well as cease and desist orders. The FCC could modify the technical terms of the license, but the burden would be on the Commission to demonstrate clearly and compellingly that the public or national interest required such a change. In the event that the license had been obtained through auction, and the modification

reduced the value, the licensee would receive reasonable compensation for the modification.[47]

As stated, the purpose of the spectrum use fee is to achieve public interest objectives more directly than by the indirect and ineffective methods of the present public trustee scheme. Based upon today's revenue of radio stations, the 1% fee could be expected to amount to $70 million in the first year, certainly a significant sum to support programs that more directly advance public interest goals. For television, based upon estimated revenues five years from now, the amount would be in the neighborhood of $600 million.

Some might argue that there is no basis for permitting present licensees to continue to operate, as opposed to other entrepreneurs or new minority owners. The recommended approach, however, would result in the least disruption (compared with an auction or lottery for *all* assignments, existing and future). In such an important area as broadcasting, minimizing disruption should be a high priority.

Unlike existing broadcast licensees, all *new* broadcast licensees would be selected by auction with the frequency being awarded to the highest bidder. The alternatives — lotteries and full length or "paper" comparative hearings—do not meet public interest goals nearly as well.

Even though the Communications Act now permits the FCC to use lotteries to select among mutually exclusive applicants (incorporating preferences that accord weight to the applicants based upon diversification criteria such as minority ownership, multiple ownership, etc.), such an approach has several drawbacks. First, even with the preferences, there is no guarantee that diversity goals will be met since the result of the lottery is still one of random selection. Second, the administration of lotteries is increasingly expensive as the number of applicants rises. This is so because the costs of entering a lottery are low, thereby encouraging applications.[48] Finally, the use of a lottery largely fails to serve any interest other than making the application process easier; i.e., it fails to serve broader congressional goals.

As for the use of a "paper hearing," it has many of the same drawbacks of the lottery process in that it too fails to aid in directly accomplishing such congressional goals as correcting marketplace failures and increasing economic, regulatory, and technological efficiency. Moreover, even with hearings that are carried out solely through the filing of opposing papers, there are high administrative costs in sorting through numerous applications. This process is likely to result in the largest delay as it requires the greatest staff or Commission scrutiny, especially when there are numerous comparative applicants. Therefore, it is recommended that auctions be used for the award of new broadcast licenses.

IV. THE BENEFITS OF AUCTIONS AND SPECTRUM FEES

There would be a continuing need for some regulation of broadcasting, even under the new "contractual" arrangement. The most fundamental need would be to maintain the provisions promoting diversification in the sources of information, the underlying premise of the First Amendment. These include regulations regarding minority ownership, multiple ownership, and cross ownership.[49] In addition, radio broadcasters would continue to be subject to proscriptions on obscene and indecent programming, lottery information, and other content that is regulated due to its criminal or fraudulent nature rather than the fact that broadcasters are public trustees. Finally, assorted technical and administrative provisions would remain. Under any broadcast regulatory model, there is clearly a need for the "traffic cop" functions of the regulatory agency.

Diversification of the sources of information is clearly one of the most important principles that must be incorporated into a regulatory system. The FCC developed its ownership policies, which have since been reaffirmed by the Congress, in order to ensure that the American public receives information from as many different sources as possible. The Supreme Court has indicated that this is the underlying premise of the First Amendment and has found the diversification principle of critical importance in the communications realm.[50] This principle encompasses both multiple and cross

ownership restrictions. Additionally, the FCC has developed policies seeking to achieve greater diversity in employment at broadcast facilities (equal opportunity programs for minorities and women at broadcast stations) and to encourage minority ownership of such stations (e.g., tax certificates). Congress has also approved these policies as in the public interest and has mandated preferences for diversification in lotteries.

Even under this deregulation proposal, there is a great need for continuance of these policies. This is especially so today as the mass media in some important respects are becoming more concentrated, thereby significantly reducing the sources of information. Moreover, ownership of broadcast stations is still overwhelmingly by white males, despite recent gains. There is still, as Congress recently found[51], a need to ensure a more balanced picture with regard to station ownership by minorities and women. Unlike most public interest obligations, the diversification provisions are structural and thus do not pose the same problems under the First Amendment of interference with editorial discretion.

The additional obligations that should remain under this new regulatory proposal primarily relate to deceptive or criminal station operation. Rather than directing broadcasters, they are aimed at protecting the public. These include the requirement mandating sponsorship identification, which requires those sponsoring broadcast matter for valuable consideration to be identified; the prohibition on obscene or indecent programming; the provisions prohibiting payola and rigged quizzes; provisions regarding broadcasts of telephone conversations; the prohibition on the broadcast of lottery information; the requirement that licensee-conducted contest information be accurate; and the prohibition against cigarette advertising. These provisions have bases other than the fact that broadcasters are public trustees. Thus, eliminating the public trustee rationale for broadcast regulation does not eliminate the need for these provisions.

Any system of charging for the communications spectrum (e.g., a spectrum use fee or an auction system or a combination) will

generate large sums of money for alternative uses, whether communications related or not. Significant sums could be generated to fund public broadcasting (with its serious and chronic funding problems) or for general public telecommunications uses. Monies could be channeled to achieve goals of minority participation in broadcasting and telecommunications, through low-interest loans or MESBICs.[52] Additionally, money could be directed toward improving public safety uses of communications by aiding the acquisition of state-of-the-art mobile communications systems for a national public safety plan. Finally, as has been proposed in many legislative efforts in this area, the money could simply go into the general treasury, helping to reduce the national debt overall.[53]

If a spectrum-charging system utilizes auctions, additional benefits accrue, particularly increased regulatory and economic efficiency. Since the auction process awards the license to the applicant who will pay the most, it ensures that the license is going to the party who values it the most and presumably will obtain it in any event through a later private auction.[54] The auction process is also likely to induce more efficient use of the spectrum since entities will be required to weigh their need for additional spectrum if they have to pay for it.[55] Furthermore, the auction will give the FCC much needed data on the actual worth of the spectrum according to its users, with such data significantly aiding the FCC in future allocational decisions.[56] The use of auctions will also greatly reduce processing time for new services, thereby helping innovative services come on line as quickly and efficiently as possible. Finally, as compared with a lottery system, there will be none of the "sweepstakes" atmosphere where applicants are encouraged to apply, since they have little to lose (relatively low entry costs) and much to gain (a valuable license that can later be traded or "auctioned" privately with potentially huge profits).[57]

Auctions would also succeed in reducing the administrative costs associated with selecting a licensee. In contrast to a comparative hearing, the auction does not require more or better engineering, legal, or economic advice to increase the probability that a license will be won, but rather only more dollars for a higher bid.

From the standpoint of the FCC as well, there would be a great reduction in the costs of processing, since the same level of professional review and analysis would not be required.[58] Further, because applicants are required to pay for the license, it is likely an auction will attract fewer applicants, thereby further reducing administrative delays.

Practically speaking, for both broadcast and non-broadcast uses, the auction method can only be used for new, unassigned licenses. Its use for present frequencies would be disruptive and unfair (since some licensees have already engaged in a "private auction," paying the value of the license to private parties). As to existing licensees, however, a spectrum use fee is feasible and advanced here as a practical means to secure some part of the value of the spectrum for the American public. Significant sums would be collected and could be used just as the monies received through an auction.

The monies collected by the FCC for the broadcast use of the spectrum through auctions and spectrum fees could be specifically earmarked for a trust fund, which would be used directly to achieve public interest goals, especially in areas where there is a clear marketplace failure.[59] All such monies could be deposited into a "Public Telecommunications Trust Fund," which would be used solely for the purpose of promoting public telecommunications, public interest programming, and minority ownership of broadcast facilities. We use the term "telecommunications" because it would be poor policy to restrict the Fund's activities solely to broadcasting.[60] The funds generated by the initial radio fees should be confined to public radio. When and if television is included, it is most important to expand the scope of the Fund to all the new and emerging video services (e.g., cable TV, VCR). Each has its own strengths, and the purpose is to make the programming supported by the Fund widely available. Indeed, there is much to be gained by including cable in the effort; not only does cable have the capacity to show such programs several times over its large capacity systems, but also cable could contribute substantial sums to the production of such programming.[61]

An important consideration in the administration of the Trust Fund would be to insulate it as much as possible from political pressure, perhaps by instituting an independent board, and by making sure the Trust Fund is free from the annual federal authorization/appropriations process. These steps would help avoid some of the problems of political entanglement that have plagued the Corporation for Public Broadcasting.

V. LEGAL AND PRACTICAL PRECEDENTS

There currently exists sufficient legal and practical precedent for the implementation of a spectrum use fee/auction system for broadcasting as well as a general auction/fee system for non-broadcast communications uses. While there has been some suggestion that a use fee would violate the First Amendment as an unconstitutional "tax" upon a First Amendment speaker, there is ample legal authority for imposition of such a fee on broadcast licensees.

As to practical precedent, the Federal government now has substantial experience with auctions. For instance, the Department of Interior uses auctions for leases of the Outer Continental Shelf and has been doing so for 34 years. It has done the same for coal leases—sealed bids are made, and if the highest bid meets a minimum bid price established by the government, the lease is awarded. Similarly, auctions have been used for leases of geothermal steam land, seized and unclaimed property, and surplus equipment.[62]

With respect to user fees, there is ample precedent under the current statutory framework holding them legally permissible.[63] In the communications realm, such fees are justified once it is recognized that government involvement is required to allocate a scarce resource, just as is the case with Federal grazing lands. Moreover, whatever differences there are argue in favor of, not against government involvement. For example, unlike in the grazing lands context, there is no private alternative. Once government intervention is accepted as appropriate and necessary, fees are easily justified since clearly an identifiable benefit is conferred upon the recipient of the government license.[64] The benefit is conferred when the government awards the scarce resource to the licensee to the exclusion of

other applicants. The license awards "a franchise to a segment of the radio audience" and assures "to the applicant a remunerative business under special Federal protection."[65] On this basis, there is arguably sufficient authority for the FCC today to proceed imposing fees, although it would not, of course, have the power to eliminate the obligations under the Communications Act as proposed. Moreover, given the Commission's previous problems in imposing fees that are legally acceptable, congressional action is indicated.

Even with specific congressional action, it is necessary to tread carefully in this area, because of attendant First Amendment strains. The leading relevant case is *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*,[66] which concerned a state use tax on ink and newsprint. Because each publication received an annual exemption for the first $100,000 of materials, only 14 of the state's 388 newspapers were subject to the tax. The Supreme Court held that even though there were no impermissible motives on the part of the state, the tax violated the equal protection and free press guarantees of the First and Fourteenth Amendments.

The flaw in the taxation scheme was that it singled out newspaper publishers from other First Amendment speakers, and additionally, singled out larger publications from smaller. The Court found that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional" (460 U.S. at 585). No such special characteristics existed for newspaper publishers, and larger newspaper publishers in particular, since the purpose was simply to raise revenue (which could have been done with a general taxation approach). The Court thus held the taxation scheme unconstitutional, using the so-called *O'Brien* test to analyze the taxation scheme—that the discriminatory tax scheme must be necessary to achieve a substantial (or compelling) governmental interest and narrowly drawn to achieve that end.[67]

When the proposed spectrum use fee is examined under the holding of *Minneapolis Star*, it is clear that it passes constitutional muster. While the fee does single out broadcasters from other First Amendment speakers, there are particular characteristics of broadcasting that justify differential treatment. Broadcasting is a medium requiring government licensing and is inherently not open to all—there are more persons desiring a broadcast license than there are available frequencies. This combination of licensing and allocational scarcity is what differentiates broadcasting from other types of First Amendment activity such as newspaper publishing.[68] A fee is permissible because it is based upon these special characteristics—broadcasters will be given exclusive use of the limited spectrum for a 30-40 year period in return for the fee.

Moreover, the spectrum fee will serve substantial governmental interests in the most narrow way possible. The congressional goals of ensuring that marketplace programming deficiencies are cured and of seeing that the scarcity rents of the broadcast spectrum are used to the public benefit will be served by using the spectrum use fee instead of a public trustee regulatory model. The fee is set in a 30-40 year contract (and thus cannot be raised or lowered to influence broadcasters' attitudes or positions as to government) and does not depend upon the content of a broadcaster's programming; indeed, the entire scheme is explicitly not dependent upon content. In these circumstances, the fee is certainly "narrowly tailored" to meet substantial and legitimate goals.

As to the use of auctions, there is legal authority for the FCC to proceed today in some areas, even without specific congressional authority. The FCC has the authority to adapt its license selection procedures in accordance with what the public interest requires. Given the FCC's reluctance to so proceed, however, explicit congressional authority is indicated here as well.

FCC implementation of the auction method for new spectrum uses and unassigned broadcast frequencies could follow other government models as to bidding methods and procedures. In this new communications context, the FCC should be given flexible authority by Congress as to the specific procedures to be used, so as to allow the Commission to adjust its procedures as circumstances require.

Sealed, rather than oral bidding should be used. Sealed bidding reduces the risk of collusion, since an unknown competitor could always enter the auction, thereby outbidding the colluding parties. Moreover, the sealed method of bidding can be expected to produce a higher return to the government, since a party does not know whether he is the only bidder and will therefore submit a bid more closely aligned with the actual value he places on the spectrum, rather than the lowest possible bid sufficient to win the frequency.[69] Additionally, the FCC should establish a minimum bid system by setting a "reservation" price below which it will not award the frequency. This should encourage maximum prices, especially if this reservation price is not announced prior to the auction. There are additional details such as payment methods, how to handle multiple channel situations, etc. As stated, we believe the Commission should have flexible and permissive authority to adapt its procedures as it deems best.

VI. CONCLUSION

The communications spectrum is a valuable but limited resource that should benefit all Americans. The time has come to charge users, either through a spectrum use fee or, as appropriate, auctions, with the money used to accomplish policy goals in the communications area more directly. Present authorization policies disserve the public and national interest. Thus, Professor W.K. Jones is surely right in concluding his study that "[f]or inefficient and highly questionable use of the adjudicating process, it is difficult to find a rival to the competitive hearing in a radio or television case."[70] The lottery process has also shown itself to be stultifying, attracting many applicants who simply hope to win on the roll of the dice, and

then auction the license at a later time to the highest bidder. Most significantly, charging for the spectrum would result in substantial short- and long- term efficiency benefits. In an area so important to the American people—communications—we ought to strive for the greatest economic and technological efficiency.

Notes

1. For example, many, including the authors, contend that the FCC originally botched the allocation decisions relating to broadcast signals by beginning television authorization in the limited VHF portion of the spectrum, thereby dooming UHF broadcast assignments. The flaws in this scheme are apparent even today when the difficulties of UHF stations are compared to the strength of the powerful VHF stations. Moreover, these problems are now being compounded in the current debate over sharing of the UHF broadcast spectrum with land mobile radio services. The solution may use spectrum that could otherwise help develop broadcast HDTV service.

Further, we are not saying that auctions could not be a most useful device in sorting out allocation claims, such as those of broadcasters, cellular, and specialized mobile radio operators in the dispute over UHF spectrum and high definition TV. Thus, a "flexible use" system could be developed where auction winners are permitted to use their spectrum for the purpose they deem most economically and technologically efficient. But the issues here are far more complex than with the authorization area, and implementation is thus not immediately practical. Indeed, as we shall show, in the latter area, there is, in the authors' view, no valid reason for not using the auction process, at least in the non-broadcast fields.

2. As to the allocation of new services, however, the authors urge that those proposing new services be awarded the grant (authorization) simultaneously with the favorable allocation decision. Such an approach would encourage new uses and proposals regarding the spectrum since it would afford the innovator a "head start" in implementing its service. Other potential users could then be selected using an auction approach.

3. *Associated Press* v. *U.S.*, 326 U.S. 1, 25 (1943).

4. *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978); 47 U.S.C. Sec. 309(i) (1988).

5. Until 1982, broadcast licensees were required to hold on to their station licenses for at least three years, thereby limiting the amount of speculation that could occur. In 1982, the FCC decided that such a restriction was no longer necessary. See *Report and Order* in BC Docket No. 81-897, 52 R.R. 2d (P. & F.) 1081 (1982). Licenses in some common carrier services are also

subject to a one year holding period while others are freely transferable at any time. See 47 C.F.R. Secs. 22.40; 1.924 (1987).

6. For instance, $510 million for a VHF in Los Angeles.

7. In recognition of the relative scarcity of TV signals and its impact upon price, the legislation provided for a flat fee of $2000 where there was a vacant VHF in the market and a 25% reduction in fees where there was a vacant UHF. Section 106(c)(2).

8. The formula was not only complex but illogical. Based upon 1979 figures, a Washington, D.C. station would pay a fee of $325,975 ($7 multiplied by 1,363,900 households minus 60,000 divided by 7 TV signals multiplied by 4 VHF signals). A Charleston, S.C. station, however, would pay $368,375, even though the market is much smaller and its "value" is thus significantly reduced ($7 multiplied by 144,200 minus 60,000 divided by 4 TV signals multiplied by 4 VHF signals). Figures from *1979 Broadcasting Yearbook*, 1979.

9. While these fees supposedly reflected "*spectrum* value," it must be understood that they were actually tied to *station* value, which depends upon many things besides the use of the valuable spectrum.

10. An earlier version of the bill, H.R. 13015, 95th Cong., 2d Sess. (June 1978) allocated the revenues from the spectrum fees for public telecommunications, a rural telecommunications loan fund, and minority ownership (Section 413).

11. See Statement of Henry Geller, Assistant Secretary for Communications and Information, U.S. Department of Commerce, on H.R. 3333, before the Subcommittee on Communications, U.S. House of Representatives, May 1979.

12. *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, Majority Staff of House Subcommittee on Telecommunications, Consumer Protection, and Finance, 97th Cong., 1st Sess. (1981), at 340-342.

13. Those figures were based on a 1985 Transcom study, "The Net Benefits of Assigning Additional Electromagnetic Spectrum to Cellular Radio Telecommunications," Transcom, Inc., May 1, 1985.

14. C.F.R. Part 90.

15. Letter to Chairman Timothy E. Wirth, Chairman of House Subcommittee on Telecommunications, Consumer Protection, and Finance, from Chairman Mark S. Fowler, dated November 21, 1985, at 8; Statement of Chairman Mark S. Fowler Before the House Subcommittee on Telecommunications, Consumer Protection, and Finance, "Spectrum Auctions: Proposal for FCC Management of the Airwaves," October 1, 1986.

16. Letter of FCC Chairman Dennis Patrick to Honorable Daniel K. Inouye, Chairman, Senate Subcommittee on Communications, dated April 26, 1987.

17. See Background Memorandum on Auction Licensing Act of 1987, April 26, 1987, FCC, at 4.

18. Compare this proposal with the proposed spectrum use fee applicable to broadcast stations, where such licensees would be relieved of significant public interest obligations.

19. A related proposal was recently made by Senator Hollings to impose a 2% of gross revenues fee upon broadcast licensees upon transfer of their broadcast license, with an additional 1% if there were a violation of the Fairness Doctrine, and an additional 2% if the license were held less than three years. S. 1935, 100th Cong. 2d Sess. (1988).

20. There is pending a court case involving the legality of the Fairness Doctrine — and thus, we believe, the entire public trustee system as it exists for broadcasters. *Syracuse Peace Council* v. *FCC*, Case No. 87-1516 (D.C. Cir.).

21. See Comments of NTIA, FCC CC Docket No. 80-116, filed July 22, 1980.

22. *Notice of Proposed Rule Making*, 50 Fed. Reg. 3809 (January 28, 1985) at par. 43.

23. *Id.* at par. 34.

24. See Comments of Henry Geller and Donna Lampert in Gen. Docket 84-1231, RM-4812, at 3-5, filed April 22, 1985; Staff Comments of the Bureau of Economics, Consumer Protection and Competition of the Federal Trade Commission.

25. Thus, Metromedia sold its cellular holdings to Southwestern Bell for $1.3 billion. See, also, *The Wall Street Journal*, "Dialing for Dollars," June 20,

1986 at 1,6. Incredibly, the FCC has now endorsed these resales. In an order released November 14, 1988, FCC #88-338, the FCC permitted the lottery winner of a cellular construction permit to transfer the bare authorization for unbuilt facilities for profit. Thus, the winner of the sweepstakes is now permitted to "privately auction" the prize. Ironically, the FCC is now permitting the "economic methods" that Congress appeared to explicitly forbid, although with no compensating public benefit. See note 27 *infra*.

26. H. Conf. Report No. 97-765, 97th Cong., 2d Sess. at 53, *reprinted in* 1982 U.S. Code Cong. and Admin. News at 2297. As noted, this congressional fear is actually unfounded because those with sufficient money always can and do ultimately obtain the license if they desire. The question is really whether the money should benefit private parties or the public at large. There was also a fear that auctions or similar "economic methods" of allocating and assigning the spectrum would run afoul of Sections 301 and 304 of the Act, 47 U.S.C. Secs. 301, 304, which state that no property or ownership rights are to exist by virtue of the license. See S. Rep. 97-191, 97th Cong. 2d Sess. (1981) at 15. Yet an auction does *not* mean there is a vested ownership right; it is only an initial selection method. The license will remain under the same terms and conditions as before, including the prohibition on ownership of the spectrum.

27. *Report and Order in CC Docket 83-1096*, RR 2d 8, 20, n. 49 (1984). In the Conference Report to the lottery legislation, Congress stated that "...[T]he Conferees intend to specifically prohibit the Commission from employing auctions or similar economic methods in managing the private land mobile spectrum." H. Conf. Report No. 97-765, *supra* at 53.

28. *Notice of Proposed Rule Making, supra*, 50 Fed. Reg. 3809 at par. 44; 47 C.F.R. Secs. 22.33; 22.916 (1988).

29. See Reply Comments of Henry Geller and Donna Lampert, In the Matter of Processing New Domestic Satellite Applications, Report No. DS-265, filed May 23, 1984.

30. In September 1981, RCA American Communications, Inc. sought to establish an auction procedure for available fixed-term leased transponders with lease rights going to the highest bidder. *RCA American Communications Inc., Memorandum Opinion and Order*, 89 FCC 2d 1130, 1141 (1982). The Common Carrier Bureau initially allowed the auction to be held. *RCA American Communications Inc.*, Mimeo #232, released October 26, 1981.

Winning bids ranged from $14,400,000 to $10,700,000, with the money going to RCA American. Ultimately, the FCC prohibited the auction, however, holding that it violated Section 202(a) of the Act, which bars rate discrimination among customers for the same service. 89 FCC 2d at 1143. While the Commission did not go so far as to say such a scheme would always be impermissible, it found it unjustified in this case. It is interesting to consider the argument of Commissioner Anne Jones, however: "The only question is who will enjoy this 'excess' or 'scarcity' value." 89 FCC 2d at 1151. The choice there was between RCA or middlemen and users. The obvious alternative to both of these options is the U.S. government.

31. Section 4(i), 47 U.S.C. Sec. 154(i)(1988).

32. Section 4(j), 47 U.S.C. Sec. 154(j). See also Secs. 303(r) and 309, 47 U.S.C. Secs. 303(r), 309 (1988).

33. *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372, 445 (1979); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968). The Commission itself has recognized its broad discretion regarding the use of differing procedures in differing contexts. *Cellular Communications Systems*, 86 FCC 2d 469, 500 (1981), *citing Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir.) *cert. denied*, 422 U.S. 1026 (1974).

34. *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1955). The obvious analogy here is to the lottery, which the FCC clearly can use without violating the *Ashbacker* principle. And, just as the case with the lottery, the Commission would still make sure that the winner of the auction is qualified and that the award of the license will serve the public interest before actually making the grant.

35. In Section III, *infra*, there is a discussion of the broadcast area, with its unique difficulties.

36. *In the Matter of Fee Refunds and Future FCC Fees*, 69 FCC 2d 741 (1978).

37. Under the Act, the FCC now has the authority to assess charges on licensees, with the amounts deposited into the general fund of the Treasury to reimburse the U.S. for amounts appropriated for use by the FCC in carrying out its functions. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Secs. 100 Stat. 117, 117-21 (April 7, 1986); Fee Collection Program, 51 Fed. Reg. 25.794 (1986). These modest fees are *not* spectrum fees in that they are not related to the *value* of the spectrum, but

rather to the costs of regulation. Moreover, these fees do not offer the same efficiency benefits as auctions or true value-based fees. While the fact that some amount is charged may reduce the number of applicants, there is still no distinction between an entity willing to pay X (cost of regulating) and one willing to pay X + Y (cost of regulating plus value of use). Thus, there is no real disincentive for low priority uses. See Gillette & Hopkins, "Federal User Fees: A Legal and Economic Analysis," 67 Boston Univ. Law Review 795, 862, fn. 235 (1987).

38. 69 FCC 2d at 768-769.

39. *Id.* at 770.

40. *Id.* at 772.

41. See Henry Geller, Broadcasting and the Public Trustee Notion: A Failed Promise, 10 Harvard Journal of Law and Public Policy 87 (1987).

42. Other types of "private auctions" also exist. For example, in a recent comparative hearing in Marco, Florida, seven applicants all agreed upon a settlement that would give a non-party the contested construction permit. The applicants agreed to forego all rights in exchange for sums ranging from $30,000 to $250,000, paid by the proposed new permittee. In effect, the applicants sought to "auction" their claims to the new party, thereby deriving significant sums from the public spectrum, with no benefit at all to the public. The Mass Media Bureau supported the agreement, which was later disapproved by an administrative law judge. The Review Board denied it, but the matter is now pending before the full Commission. *In re Applications of Rebecca Radio, et al For Construction Permit on Channel 224 A, Marco, Florida*, MM Docket No. 87-244. Compare with recent cellular "private auction," at n. 25 *supra*.

43. Such a fee is not truly a "spectrum fee" in that it is tied to the revenue of the licensee rather than the value of the spectrum. While there is some correlation, since revenue-earning potential increases value, the fact that the usage fee would be set at 1-2% is not based upon the value of the spectrum. Such a usage fee can still be distinguished from a pure "tax," which does not correlate in any way to the benefit received. See Gillette and Hopkins, *supra* 67 Boston Univ. Law Review 795, 819 (1987).

44. Congress could specifically provide criteria by which "success" is to be gauged. Relevant factors include whether the fee generates revenue sufficient to remedy marketplace failures in childrens, local, public affairs and minority programming and whether such programming is in fact produced; whether levels of fines and forfeitures are appropriate; whether minority ownership has been improved; and whether the absence of "public trustee" regulation is consistent with or conflicts with the overall broadcast allocation scheme. Aditionally a 5-year hiatus will let Congress re-evaluate and fine tune the specific deregulation scheme.

45. While it might be argued that retaining *any* content based provisions, such as Section 315, is inappropriate, there is a very strong interest served here. Broadcasting is the most important medium of communications for political candidates, and the interest in maintaining some level of fairness in the political use of the medium outweighs the limited negative impact of such regulation, especially when it is applicable to paid time alone.

46. It is interesting to note that the government of the United Kingdom is now planning to use this precise approach for radio. It will auction frequencies to the highest bidder and replace the traditional public service regulation that directed broadcasters in what they could do, with "light regulation" designed to protect consumers. See FCC News Release, Wed., February 3, 1988, Vol. 21, No. 21, *citing* Radio and Records, January 29, 1988, at 9.

47. This increased "certainty" would also be appropriate for non-broadcast licensees if they are charged a spectrum use fee or obtain the license via auction. Again, this does not mean, however, that licensees in any way "own" the spectrum. See n. 26 *supra*.

48. The FCC now charges a fee of $200.00 for a cellular application — extremely modest in light of the value of the license. Even if the fee were to rise substantially, however, a lottery would still be less advantageous than an auction because there would still not be "economic efficiencies" as is the case when the "fair market value" of the spectrum is paid. See n. 37 *supra*.

49. All ownership regulations would be implemented by requiring statements of compliance from licensees, especially as to EEO. In the event of a compliance failure, as stated above, licensees would be subject to fines and forfeitures and cease and desist orders. As to ownership by minorities, current mechanisms to increase minority ownership would be retained (tax

certificates, MESBICs, etc.) and ideally, new mechanisms would be developed using the Trust Fund. Minority ownership regulations would continue until there was an affirmative determination by Congress that they were no longer needed to correct past imbalances.

50. *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1943); *FCC* v. *NCCB*, 436 U.S. 775 (1978).

51. *Minority Broadcasting, Station Ownership and Broadcast Programming: Is there a Nexus?* Economics Division of Congressional Research Service, June 29, 1988.

52. A MESBIC is a minority enterprise small business investment corporation.

53. While generation of revenues is not the primary benefit, it is certainly significant and will have a great impact on the political attractiveness of altering the regulatory structure of communications.

54. It is fallacious to assume that the spectrum will only end up going to those with the most money. Regardless of how licensees are selected, licensees can always sell their authorizations and, therefore, the method of awarding actually has little effect on who gets the license in the long run. Even today, those with the most money can purchase licenses if they so desire. Auctions would to a large extent guarantee that those who value the license receive it initially and thus eliminate the wasteful resale process. See n. 26 *supra*.

55. This additionally holds true for spectrum fees.

56. Since auctions will reduce the amount of time that it takes for the spectrum to be put to its most effective use, the FCC will have information on the value of the spectrum for particular uses much more quickly so that it can, if necessary, alter its allocation plans. See *Domestic Satellite Service Industry Structure & Licensing Alternatives*, by Gary K. Noreen, Vice President and General Manager of Wismer & Becker System Technologies, October 31, 1986.

57. Thus, before it was known that the FCC would use a lottery to award cellular licenses, only 1200 applications were filed for the top 90 markets. After the lottery method was selected, more than 5000 applications were filed for markets 91-120, and for markets 121 - 305, approximately 90,000

applications. The FCC estimates over 100,000 applications will be filed for the remaining markets. Applicants clearly view the lottery as a "chance" to resell a winning application.

58. There might be some new administrative burdens depending upon how the auction were implemented. For instance, a showing that a bidder has the financial wherewithal to pay the amount bid would require administrative personnel. Nevertheless, these burdens would be slight compared with present costs and in relation to the overall benefit.

59. We acknowledge that there is an alternative way to proceed here — to allow such funds to be deposited into the general treasury and be subject to specific appropriations if desired. This method of proceeding does have advantages over the proposed dedicated fund, which is locked in. Nevertheless, this alternative is rejected here on the assumption that the only way to ensure a fair bargain for the public is to ensure the funds will be used in the communications realm.

60. In addition, if a fee is implemented for non-broadcast areas, such monies would also be deposited into the Public Telecommunications Trust Fund.

61. The Cable Communications Policy Act of 1984 allows the franchise authority to assess a fee of up to 5% of gross revenues, and allows the sums so obtained to be used for any purpose in the authority's discretion. Section 622 of the Cable Communications Policy Act of 1984, 47 U.S.C. Section 542 (1988). This is poor policy and possibly unconstitutional. H. Geller, A. Ciamporcero, D. Lampert, "The Cable Franchise Fee and the First Amendment," 39 Federal Communications Law Journal 1 (1987). We therefore urge that a substantial portion of the fee (e.g., 2 to 3%) be used for the production of video programming, to be shown over cable and then other telecommunications means (e.g., public TV, VCRs).

62. For additional examples, see Kwerel and Felker, OPP Working Paper #16, Using Auctions to Select FCC Licensees, May 1985.

63. Fees that are strictly tied to costs of regulation are clearly proper under a "voluntary action" theory. Under such a theory, as enunciated by the Supreme Court, "A fee ... is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcasting station." *National Cable Television Association*

v. *U.S.*, 415 U.S. 336, 340 (1974). The assumption is that if an entity voluntarily enters a business with the intention of receiving a benefit, it therefore assumes all burdens associated with operating the business, including the costs of regulation via fees.

64. See *National Cable Television Association* v. *FCC*, 554 F.2d 1100, 1104-1105 (D.C. Cir. 1976).

65. S. Rep. No. 2120 81st Cong., 2d Sess. 1 (1950).

66. 460 U.S. 575 (1983).

67. 460 U.S. at 591-592; *Arkansas Writers Project* v. *Ragland*, U.S.L.W. 4522, 4524 (1987).

68. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

69. For additional viewpoints on these matters, see Kwerel and Felker, OPP Working Paper #16, Using Auctions to Select FCC Licensees, May 1985 at 22-23.

70. W.K. Jones, Licensing of Major Broadcasting Facilities by the FCC, Administrative Conf. of the U.S., September, 1962, at 198-99.

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